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MY STATION AS A LAWYER

Geoffrey C. Hazard, Jr.[†]

INTRODUCTION

One of the most persistent criticisms of lawyers' professional ethics is that lawyers are permitted or required to act ex officio in ways that they would not consider proper in their personal conduct. This criticism was perhaps best expressed by Professor Richard Wasserstrom almost 15 years ago.¹ It has been echoed and elaborated by others since, notably Professors Postema and Simon.² However, this criticism begins with an erroneous premise and leads to erroneous implications. The criticism is wrong, I believe, because it misapprehends legal ethics generally. The topic thus is a formidable one, to which justice cannot be done in a single article. Nevertheless, a start can be made.

The thesis of this article follows part of what the philosopher F.H. Bradley argued in his essay, *My Station and Its Duties*.³ Bradley's essential point was:

[†]Sterling Professor of Law, Yale University. B.A. 1953, Swarthmore College; LL.B. 1954 Columbia Law School; M.A. 1971, Yale University (Honorary); LL.D. 1985, Gonzaga University (Honorary); LL.D. 1985, University of San Diego (Honorary); LL.D. 1988, Swarthmore College (Honorary). This essay is an extended version of the Spring 1989 Henry J. Miller Distinguished Lecture delivered by Professor Hazard at the College of Law, Georgia State University.

1. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975-76).

2. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

3. F. BRADLEY, *My Station and Its Duties*, ETHICAL STUDIES 98 (R. Ross ed. 1951) (originally published 1876).

To know what a man is . . . you must not take him in isolation. He is one of a people, he was born in a family, he lives in a certain society, in a certain state. What he has to do depends on what his place is, what his function is . . .⁴

My essential point is that since Bradley's proposition holds true for people generally, it holds true for people who are lawyers. Hence, to paraphrase Bradley, what a lawyer has to do depends in large part on the fact that the person is a lawyer.

At the outset I should make clear that my argument is not an apologia either for the American legal profession as it exists or for the rules of professional ethics as they exist. Many things are wrong with the American legal profession. Also, many defects exist in the most recent codification of the ethical rules of professional ethics, the Model Rules of Professional Conduct promulgated by the American Bar Association.⁵ More serious is the widespread violation of ethical rules by members of the legal profession. In my observation, law practice as presently conducted is rife with violations of the rules concerning competence, conflicts of interest, and fair-dealing with clients. Discussion of that situation will have to wait for another day, however. The matter presently being examined is not the virtue of the bar as measured by its ethics rules, but a philosophical inquiry into the virtue of the ethical rules themselves.

I. BASIC LEGAL ETHICS

Some basic rules of legal ethics are deeply troublesome when considered in terms of conventional ethical precepts. The basic rules of legal ethics include one about advocacy and another about negotiation. The rule of advocacy is that a lawyer representing a party in litigation is responsible for presenting evidence and argument in a fashion calculated to induce the tribunal to decide in favor of the advocate's client.⁶ The rule

4. *Id.* at 110.

5. See MODEL RULES OF PROFESSIONAL CONDUCT (1983). Having assisted in drafting the Rules, I am especially familiar with these defects. For example, the rules on prevention of client fraud are confusing and misunderstood. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d), comments 6, 7, and Rule 1.6 (1983). Also, the rules on imputed conflicts of interest could be improved. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983).

6. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983) ("as advocate, a lawyer zealously asserts the client's position under the rules of the adversary system"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1981).

about negotiation is that a lawyer representing a party in negotiation is responsible for presenting the client's position in a fashion calculated to yield the best possible benefits to the client.⁷ Both rules define the lawyer as a partisan for his client vis-à-vis the opposing client. In litigation, as General MacArthur once said about war, the "very object is victory." In negotiation, the very object is to garner as many chips as possible for the client.

According to conventional teaching, these rules of legal ethics are morally repugnant. Both rules repudiate the moral principal that all people with whom an actor has relationships should be treated on an equal basis.⁸ In place of this principle of equality the rules of legal ethics introduce two classes of "relevant others": those that lawyers will help as friends and those that they will struggle against as foes.⁹ The rules then commend aggressive assertiveness in relation to nonfriends. To be sure, aggression on behalf of a client is not always required, for the client's aim may be amelioration of the relationship with the other party. Also, the client's strategic position may be defensive and require only being watchful that the other side might take action to change the status quo. Be that as it may, resort to strategic coercion is fully legitimate under the ethics of advocacy and negotiation.

There should be no equivocation on this point. Both litigation and negotiation involve the exercise of coercion, even if the coercion is nonviolent.¹⁰ Moreover, the rules of role for the advocate and the negotiator allow some forms of deception, at least when judged by the standard of disclosure that is taught in conventional morality.¹¹ There should be no equivocation about this either. Neither as advocate nor as negotiator is a lawyer required to tell the other side all of what he knows or any of what he really thinks of the merits of his side. Indeed, he is

7. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983) ("[a]s negotiator, a lawyer seeks a result advantageous to the client . . .").

8. Perhaps our most fundamental moral lesson was put forth in the Christian tradition in the Sermon on the Mount: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets." *Matthew* 7:12 (King James).

9. Cf. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060, 1060-65 (1976).

10. See Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

11. See White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 928, 931 (1980).

prohibited from giving away such secrets.¹² As a result, the opposing counsel may have to grope in an ignorance that the lawyer could alleviate. In contrast, friends and neighbors would not behave that way toward each other, or so we are instructed in conventional morality.

This brief account of basic legal ethics omits important qualifications and refinements. However, it highlights the rules of the lawyer role that are ethically most troublesome. Virtually all of the "hardest questions" about advocacy and negotiation, to use Professor Monroe Freedman's phrase,¹³ are connoted by these rubrics. How can you plead the statute of limitations against a widow's pension claim? How can you conclude a negotiation on terms you know are less generous than your client would be willing to offer? These questions challenge the ethical foundations of everyday law practice which involves partisanship, coercion, and, according to the strict definition earlier alluded to, deception. The "hardest questions" are hard precisely because conventional morality teaches a different course of action in these situations. Conventional morality would affirm that any right-thinking person, i.e., someone who is not a lawyer, would decide for herself whether the criminal accused was guilty and defend him only if satisfied that he was not. A right-thinking person would call the widow and remind her to file her pension claim soon because the statute of limitations might otherwise run. The right-thinking person acting as a negotiator would put all the bargaining chips in the middle of the table and then carefully divide them in half.

These courses of action would be open to a lawyer if the rules of legal ethics were other than they are. Criticisms of lawyers' ethics usually mince words when it comes to these alternative courses of action. The lawyer is admonished to consider competing factors, including counseling the client and exercising independent moral judgment.¹⁴ I agree that these ameliorating deliberations and endeavors are appropriate, and often imperative. But they do not obviate the fact that the client has authority to instruct the lawyer what course of action to pursue, so long as the course

12. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(2) (1981) (generally, an attorney is prohibited from using "a confidence or secret of his client to the disadvantage of the client").

13. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

14. See Simon, *supra* note 2, at 1091.

of action is within the limits of the law.¹⁵ Sooner or later, perhaps regretfully, the lawyer has to act. If the course of action open to the client is within the limits of the law, the lawyer is required to carry it out if that is the client's wish.¹⁶ The lawyer may withdraw if he finds the course of action repugnant,¹⁷ but even then he cannot go to the other side to help put the matter right.¹⁸ He can only suffer in silence.

Thus, the lawyer has a very limited scope in charting the course of action once the client has made a firm decision. Under the rules governing her station, a criminal defense lawyer cannot turn in a client, no matter how clearly guilty, no matter how heinous the crime.¹⁹ A lawyer counseling a creditor cannot withhold the statute of limitations defense if the client wants it asserted, no matter how piteous the claimant, no matter how great her need.²⁰ (The lawyer could of course give the widow some of his own money.) A lawyer conducting negotiations cannot transform herself into a neutral arbitrator without the client's consent.²¹

Suggestions are sometimes made that lawyers have freedom to pursue these alternative courses of action. Lawyers have no such freedom. The rules of professional ethics foreclose that freedom and those rules have the force of law.²² Suggestions that a lawyer consider such possibilities, hence, do not invite serious deliberation about real alternatives. At most they compel the sad recognition that the duties of a person's station often limit her courses of action. At worst they are pious cant.

15. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983) (generally, the "lawyer shall abide by a client's decisions concerning the objectives of representation").

16. See *id.*

17. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1983) (an attorney may withdraw from representation if the "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent").

18. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (generally, an attorney "shall not reveal information relating to representation of a client"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (1983) (stating the general rule that an attorney may not "use information relating to the representation to the disadvantage of [a] former client").

19. The rules concerning the attorney-client privilege were designed to encourage full disclosure of facts to the attorney, thereby increasing benefit to the public by insuring counsel against future wrongful acts. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment 9 (1983). Thus, a lawyer may—but is still not required to—reveal confidential information only to "prevent the client from committing a criminal act" and only if the act is "likely to result in imminent death or substantial bodily harm." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

20. See *supra* note 6.

21. See *supra* note 7.

22. See *supra* notes 6, 7, 13, 15–20 and accompanying text.

II. CONVENTIONAL MORALITY

These limitations on the lawyer's course of action are deemed repugnant, according to conventional morality.²³ A basic dimension of conventional morality in our culture is the principle of universality. According to this principle, all persons in an actor's world are regarded as equally entitled to the protection of moral norms. In one form or another, the principle of universality is as old as moral philosophy itself.²⁴ While the Greeks had difficulty defining a moral universe more inclusive than adult male citizens, the principle of universality held within that community. In Kantian philosophy, universality became a categorical imperative ordaining strictest regard for all interests of every other person as the essence of morality itself. Utilitarianism incorporates much the same principle.

A second fundamental element of conventional morality is that the universals consist of concrete norms which actually govern one's relations with other persons. The Ten Commandments express this concreteness.²⁵ "Thou shalt not kill" is a specific interdiction against killing anyone under any circumstances. It is not merely a direction, like those in developed legal rules, to give due weight to the value of human life. So also the command "Thou shalt not steal" is an interdiction against taking another's property of any kind. In the Christian tradition, the basic ethical tenet is still broader and laden with affirmative duties: "Thou shalt love thy neighbor as thyself."²⁶

Conventional morality thus presumes that ethical obligations exist that have both universal scope and concrete content. This concept of morality is imparted to most people who are socialized to American culture. The message is originally delivered in elementary terms when we are of tender years, for example, in admonitions such as "Don't hit your sister" and "Don't be a pig." As we progress through our childhood, these propositions are extended to cover neighbors, classmates, and teachers, and to others generally. At a quite different level of abstraction, they are affirmed in the standard courses in philosophy, humanities,

23. See *supra* notes 6-9 and accompanying text. I use the term "conventional morality" by way of description, not deprecation. It is what most of us are brought up to believe.

24. See generally M. SINGER, *GENERALIZATION IN ETHICS* (1971).

25. *Exodus* 20:3-17.

26. *Matthew* 22:39; *Romans* 13:9.

and social sciences offered in college. Under the universalist norm, in principle every person is equally charged with concrete ethical obligations and every person is correspondingly entitled to the protection of such obligations.

If the tenets of conventional morality are taken seriously, there is no escape from the conclusion that the norms of professional legal ethics are morally repugnant. The essential premise of professional legal ethics is that clients are entitled to special protection compared to all others in the lawyer's world. Correlatively, lawyers' duties accord less protection toward various other classes of people, depending on their relationships. Toward many such others, the lawyer's duty may go no further than refraining from fraud. Whereas conventional morality traditionally rejects in principle the notion of friend and foe, legal ethics adopts that notion as its very foundation.²⁷ Professional legal ethics therefore necessarily contradicts conventional morality.

It is this contradiction that I wish to take as a point of departure. Criticism of legal ethics usually begins with acceptance of the premises of conventional morality, in particular the premise that there are concrete obligations which every person owes to every other person. I propose that this premise of conventional morality is wrong—that it is erroneous to assume that, in the realms of the real world, there are norms of both universal applicability and specific content. A related proposition, the one to which I adhere, is that concrete norms in the real world are not universal but are situational or relativistic. In this perspective, the set of professional legal ethics is simply one of many subsets of relativist ethical relationships.²⁸

III. OUR LONELY STATIONS

The same point was pithily expressed a few years ago by Elliott Richardson in the phrase: "Where you stand depends on where you sit." Richardson, you will recall, at one time or another held the positions of Attorney General, Secretary of State, Secretary of the Treasury, and other important posts.²⁹ Richardson

27. The very nature of the adversary system pits one party against the other. *See* J. TANFORD, *THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS* 3 (1983) ("[t]he earliest form of the adversary system was trial by battle").

28. This was F. Bradley's key point. *See* F. BRADLEY, *supra* note 3, at 124–28.

29. *See* 2 *WHO'S WHO IN AMERICA* 2587 (1988-89).

was reflecting on the fact that, for example, as Secretary of State he took a different position on a variety of issues than he did as Attorney General. The point would hold even more clearly when applied to the positions of Secretary of State vis-à-vis Senator, and so on.

Bradley's argument is an infinite extension of this proposition. Every individual has a distinctive place-perspective and from that station has unique duties that are a function of that position.³⁰ This premise implicates a radically relativistic moral framework. Such a framework invites disparagement, and generally gets it. However, disparaging radical relativism in ethical analysis puts the cart before the horse. A radical relativist framework is not of itself moral or immoral. Bradley's thesis is a simple statement of fact with which any serious ethical analysis should begin. At least it is a statement of fact if we decline to accept the premise that there is an all-knowing God who has a universal awareness and who endows each one of us with some part of His perspective. If there is no such God, or if we are not given that endowment, then no one of us knows exactly what another sees or thinks. Each of us is alone in our awareness and sees only a part of each scene. For this reason, it is impossible for us to share with each other perfectly commensurable visions of the reality around us.³¹ Our limited existence as human beings imposes on us a transitory and situation-bound comprehension of the world, whether we like that limitation or not.³²

That every moral actor has bounded horizons seems fatal to a concept of ethical norms that are both universal and concrete. All value decisions and ethical propositions depend in part on a vision of reality upon which they are predicated. For example, the command "Thou shalt not kill" presupposes that the actor sees the other whom he is in a position to kill and recognizes him as a person and not a deer or a bear. The command "Thou shalt not steal" presupposes that there are goods which the actor knows belong to someone else but which the actor may be inclined to misappropriate. Even if each of us understands the words of

30. F. BRADLEY, *supra* note 3, at 110.

31. "Is there any knowledge ... which is so certain that no reasonable man could doubt it? ... [The color of the table] is not something which is inherent in the table, but something depending upon the table and the spectator and the way the light falls on the table." B. RUSSELL, *Appearance and Reality*, reprinted in W. BISHIN & C. STONE, *LAW, LANGUAGE, AND ETHICS* 146-48 (1972).

32. See F. BRADLEY, *supra* note 3, at 106-09.

these commands in the same way—itself an implausible premise—we do not and cannot comprehend in the same way the field of action in which the commands will actually operate. On the contrary, each of us responds to a different reality, even if our differences in perception may be only small in degree. Consequently, each of us must make a unique ethical interpretation of what we must do from where we are stationed. We can of course compare notes, feel empathy, express sympathy, and strive for mutual comprehension. Nevertheless, however much we may wish for community in perception and evaluation, we are consigned in the end to solitude.

Realization of our individual isolation need not be an occasion for lamentation. On the contrary, this realization can be a pathway to deeper understanding of the nature of moral and ethical issues. Among other things, facing the relativism of ethical norms could help us escape the utter deadness of discourse on ethics that often proceeds from a premise that ethical norms must be universal.

IV. CONVENTIONAL ETHICAL DISCOURSE

Discourse on ethics usually deals with one or two matters. The first addresses the substantive rules of ethical conduct; the second addresses the intellectual technique or process of deliberation upon ethical questions. The latter is generally called metaethics and is primarily of technical interest within academic philosophy.³³ I want to say something about each of these matters.

A. *Substantive Norms*

The first stage of conventional discourse about substantive norms tends toward predictable conclusions. These conclusions restate the basic universal norms that “Thou shalt not kill,” “Thou shalt not steal,” and “Thou shalt not lie,” or, as the Ten Commandments put it, “Thou shalt not bear false witness.”³⁴ Wherever conventional ethical discourse begins, it seems to start with these basic propositions. It also usually stops with them.

If a second stage of substantive discourse is reached, the discussion quickly becomes a form of legal analysis. Every norm becomes subject to extrapolations, qualifications, and exceptions.

33. For example, this essay is itself an elementary exercise in metaethics.

34. *Exodus* 20:16.

For example, the prohibition against killing is extrapolated to prohibit maiming and assault. From this point, a further extension can be made according to which injury to a person's reputation or social standing is equated to physical injury.³⁵ A similar extrapolation is readily made of the prohibition against theft. Theft can be defined to include not only physical asportation, as the common law used to call it, but extortion, theft by trick, misrepresentation, and securities fraud.³⁶ A still further extension is involved in the old maxim: Who steals my purse steals only gold; who steals my good name And just as fraud can be equated to theft, so misleading statements, as distinct from outright falsehoods, can be assimilated to lying.³⁷

These are important extensions of the original norms. However, the question immediately arises about the proper scope of these extensions. This uncertainty usually arises from a concern, sometimes unstated, that the rule should not be universally extended, because in some applications it would be unfair.³⁸ For example, the rule against killing is qualified so as not to prohibit one who is attacked from using violent means of self-defense.³⁹

When concrete cases are confronted in this way, none of the basic norms holds without qualification. Thus, "Thou shalt not kill" permits killing in justified self-defense⁴⁰ and also permits commission of homicide in the performance of lawful duty by a soldier or a policeman. The ultimate extension of the justified killing concept is reflected in the concept of a just war. Similar qualifications are imposed on the prohibition against stealing. Thus, a creditor is allowed the self-help of exercising dominion and control over property that could pay the debt but with which the debtor threatens to dissipate or abscond.⁴¹ Similarly, lying does not include diplomatic euphemisms and so-called white lies.

35. See, e.g., W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 772 (5th ed. 1984) ("[around the seventeenth century] tort damages were awarded to the person defamed, probably in order to provide a legal substitute for the duel when it was forbidden").

36. See MODEL PENAL CODE § 223.1(1), comment 2 (1980) ("conduct denominated theft in this Article constitutes a single offense . . ." embracing the separate offenses heretofore "known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like").

37. See White, *supra* note 11, at 928.

38. See *id.* at 928-29.

39. See MODEL PENAL CODE § 3.04(1) (1985) (use of force justifiable for protection of the person).

40. *Id.*

41. W. KEETON, *supra* note 35, § 22, at 139.

What started out as ten apparently simple commandments eventually is elaborated into a legal code. When the debate reaches this stage, attention has shifted, perhaps by imperceptible degrees, to the actor's specific situation. At the first stage of substantive discourse, attention centers on a duty formulated in universal terms, without regard to the circumstances of its application. The rules come out unqualified: "Thou shalt not kill," "Thou shalt not steal," "Thou shalt not lie." At a second stage, extensions and limitations are introduced that cover specific situations. But with this step the norms cease to be universal and their structure becomes legalistic. Legal analysis is indeed relativist ethics by another name.

B. Metaethics: Philosophical and Popular

Metaethics examines the process of apprehending the content of ethical obligations. One process of apprehending ethical obligations is exemplified in the reception of the Ten Commandments. The obligations engraved in the tablets originally were accepted by the Jews because the tablets were handed down by their God.⁴² Christians accept the ethical preaching of Jesus on a similar basis, and Buddhists believe they are recipients of inspired ethical teaching.

To an important extent, positive ethical philosophy since the time of Kant and Bentham has been the quest for a substitute source of ultimate normative authority.⁴³ Some philosophers, notably Hegel, considered the State to be such a source. Others, notably Kant and Rawls, have constructed an ethical logic from a premise of human equality.

The various metaethical modes nevertheless reach quite similar conclusions regarding the content of general ethical duties. The conclusions are mostly the same as those of conventional morality, namely that one should not kill, nor steal, nor lie, etc. More or less explicitly it is understood that these universal norms are required by the human condition. The rule against killing reflects the facts that many humans have passions which lead them to acts of violence and that physically all human beings are extremely vulnerable. The rule against stealing reflects the fact that many

42. See *Exodus* 24:3.

43. See A. MACINTYRE, *AFTER VIRTUE* 35–48 (1981); B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 120–31 (1985).

humans want things that belong to others. The rule against lying reflects our lamentable proclivity for confabulation.

Once these familiar basic norms have been formulated, metaethical exposition can go little further without considering the specific situations of those whom the norms are to bind. As previously described, consideration of specifics inevitably leads to legalistic qualifications. Philosophical metaethics nevertheless tends to abjure analysis of specific situations. Indeed, analysis of concrete ethical problems is called "situational ethics," with an intended pejorative connotation.

Addressing ethics in terms of universals at a high level of abstraction is also characteristic of popular metaethics. These discussions are conducted by either teachers or preachers and usually are addressed to student bodies or congregations. In one paradigm, the teacher holds a chair in philosophy and the audience consists of college students. The teacher's position is disengaged from the world and immune from political constraints, so that "the truth" can be expounded without fear of consequences. The student audience likewise occupies a protected position, enjoying a postponement of adult life and the responsibilities that go with it. In this situation, neither party to the dialogue is engaged in actually resolving concrete ethical problems in any specific set of circumstances. On the contrary, the setting is engineered to exclude, as far as humanly possible, consideration of specific personages and positions.

The other popular discourse on substantive norms is by preachers to congregations. Here again the forum and the participants are isolated from the realities of specific social settings. The forum is a sanctuary in the literal sense. The meeting is convened in the name of God, and the preacher enjoys surrogate immunity from the constraints of time and place. Members of the congregation in principle have identity only as listeners to the Word. In this religious setting, as in its academic counterpart, discussion of ethical obligation is cast in universals that acknowledge no limitations as to persons and circumstances. Specific cases are used only to illustrate universals, and substantive content almost inevitably devolves to the basics of the Ten Commandments.

Preoccupation with universals in ethical discourse may be particularly congenial to American thought. It is wholly compatible with our Judeo-Christian religious tradition, epitomized in the Ten Commandments and Jesus' summary of them in the Two

Great Commandments.⁴⁴ The universal conception of ethical obligation is especially congenial because it emphasizes equality of community members. While the American social community, in fact, is stratified in socioeconomic terms, and segmented in terms of ethnic identity, religious affiliation, subculture, and regional identity, popular ethical discourse relentlessly emphasizes the theme of equality, as deTocqueville observed long ago.⁴⁵ So far as earnest moral discourse is concerned, the United States is a land of classrooms and congregations.

The political and social ethos of our country thus conduces to the premise that ethical obligations consist of norms of universal applicability. Universality is assumed to be the essence of ethical norms, their necessary property. This presupposition necessarily excludes detailed consideration of the particular stations of particular individuals or sets of individuals. It excludes consideration of whether an actor's station may determine how far he can or should give effect to universal obligations imposed by the moral codes. In the context of a universal moral code, such considerations of station and circumstance are in principle irrelevant.

V. STATIONS IN LIFE AND THEIR NORMS

The irrelevance of any specific application of universal morals may explain why traditional ethical discourse, in the received academic and religious traditions, is virtually antithetical to professional ethics. By definition, professional ethics concerns a subset, or norms specifically governing some subset, of people who have a specific station in life, a particular vocation. These stations include not only those of lawyers but also those of doctors, public accountants, social workers, business managers, government employees, auto mechanics, clerks, and spouses at home. Each vocation is governed by a set of special norms consisting partly of law, sometimes formal professional codes or statements of aspiration, and largely of informal, subcultural ethical norms. Each station has its own history, lore, and

44. "And thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind, and with all thy strength: this is the first commandment. And the second is, . . . Thou shalt love thy neighbour as thyself." *Mark* 12:30–31.

45. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (R. Heffner ed. 1956). Indeed, one of our most sacred legal documents states "[w]e hold these truths to be self-evident, that all men are created equal . . ." The Declaration of Independence para. 2 (U.S. 1776).

mythology. Each is governed by a specific set of norms that applies only to that subset of the population, defined in terms of their vocation or position in society.

Of course, within the membership of any vocation, some may have quite different positions than others. For example, the Justices of the United States Supreme Court are lawyers; so too are the advocates who defend misdemeanor cases in the lower criminal courts. Yet we can discern at once that the vocation of Justice is rather different from that of practitioners in the lower criminal courts. The fact remains that the Justices and the members of the criminal defense bar, however great may be the differences among them, are alike in commonly being recognized as lawyers. This recognition is accorded by society at large and accepted and reinforced by lawyers themselves. So it is also with doctors, accountants, business managers, and government servants—members of all professions.

Intelligible discourse about ethical responsibilities of such people begins with the special characteristics of their vocational position. It would be idiotic to ask whether a doctor has an obligation to prevent his client from lying in court, or whether an architect must verify the client's inventory before certification of a financial statement. However, the characteristics of a vocation immediately introduce considerations that are excluded in the conventional ethical discourse. For example, a distinguishing characteristic of a "lawyer" is that, in the usual practice setting, the lawyer has a client. The client is a person to whom the lawyer has certain special responsibilities that are not owed equally to persons who are not the lawyer's clients. Similarly, the vocation of a "doctor" implies the existence of a "patient." For a doctor, a patient is a special "relevant other" to whom the doctor has responsibilities that are different from responsibilities running to those who are not her patients. Business managers have responsibilities to employees and to stockholders that they do not owe to other people. Likewise, it would be absurd to suggest that a parent has the same responsibility to a child across the country, or even across town, as to her own child.

In ordinary life, all of us have such special stations. In fact, each of us has a multiplicity of them, as Bradley noted.⁴⁶ One of our stations is our way of earning a living, which most of us must do somehow. We may be someone else's employee, or an

46. F. BRADLEY, *supra* note 3, at 110.

independent contractor who sells her services in market transactions, or have some kind of relationship with someone else, such as marriage, whereby another income earner provides outside sustenance in a cooperative living arrangement. Everyone is an economic dependent in some sense. That dependency carries with it responsibilities and duties toward others that do not obtain toward those with whom we do not have such a relationship. As an employee of Yale University, I have responsibilities to Yale University that I do not owe to other universities. The same holds for my responsibilities to the American Law Institute. And so for each one of us.

The same analysis applies to family relationships. I have responsibilities to my children that I do not have to other young people. The same is true of one's position as a citizen of the United States. We owe responsibilities to the United States, for example, paying taxes, which we do not owe to other governments. As a citizen of New Haven, I have responsibilities that are not shared by citizens of Atlanta. So also for my neighborhood, my church, my club, my political party, and my circle of immediate colleagues and friends.

Each of us exists in a unique set of interlocking relationships. Within each relationship we have obligations and responsibilities peculiar to that set. I have responsibilities as a lawyer, as a citizen of New Haven, as a citizen of the United States, as a parent and spouse, and so on. No one else has a set exactly like mine. If for no other reason, no one is subject to precisely the same configuration of obligations. These individual characteristics are not simply descriptive or adventitious. They constitute the very definition of one's identity in a community.

In each of these stations, not only do I have obligations, but I am the beneficiary of obligations that others owe to me. That is, others are expected to deal with me according to the rules of my station. Yale University is required to pay me every month and to provide for my old age and, perhaps, even to treat me as a social equal along with its alumni. People who live in my neighborhood are expected to look out for me in some minimal sense. So it is in my vocation. As a lawyer, I am entitled to be heard concerning my client's cause, even if my argument is poor and even if the client could have made the argument himself. Thus, my station in life entails not only special duties but special opportunities.

The obligations that others owe to me result in my having capacity which I would not otherwise have. As a lawyer, I can

do things about the administration of justice that cannot be done by people who are not lawyers. As a parent, I can do things for my children that others are not in a position to do. We all have stations where we can, if we will it, make some differences, at least at the margin. It is the calculation of what we can actually do at our stations that is the essence of practical ethical deliberation. Conducting such deliberations, and knowing how to do good rather than bad, is not precluded by recognizing the fundamental relativism of our situation. Indeed, rationally understanding one's capacity and therefore one's ethical opportunity has to begin there. For those of us who are lawyers, such understanding begins with accepting our station as such.

CONCLUSION

Our society instills in us a deference to a universal code of moral conduct. In broad terms this moral code admonishes us to refrain from killing, stealing, lying, and more generally, to love others as we love ourselves. This lesson is repeated over and over in homes, classrooms, and churches. In contrast, a legal code requires a lawyer to represent a client zealously, within bounds only of the law, regardless of the consequences to the other party. This rule, defined thus, is amoral and, indeed, immoral in terms of the universal moral code.

It is erroneous, however, to condemn legal ethics by reference to the universal moral code. First, broad commands in the moral code, such as "Thou shalt not kill" and "Thou shalt not steal," are qualified when applied to real experience. Hence, even such aggressive acts as killing may be justified in war or self-defense. Second, each one of us is bounded by our own unique existence. As parent or doctor or corporation president, each of us has a unique perspective, a unique set of obligations. Our perspective and obligations are necessarily limited by our stations in life.

The role of lawyer is no different. The lawyer is a zealous advocate or a shrewd negotiator because that is his duty. He owes a primary responsibility to his clients just as a parent owes such a responsibility to his child. Far from agonizing that there is a unique disjunction between the universal code morality and the code of legal ethics, we should recognize that the legal code is merely a subset of the relativist ethics by which everyone must conduct everyday life. At the same time, in recognizing the uniqueness of the lawyer's role, we may appreciate more fully

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the opportunities open to a lawyer, however slight, for improving the law and society.

